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No. 95-992

In the Supreme Court of the United States

OCTOBER TERM, 1995

TURNER BROADCASTING SYSTEM, INC., ET AL.,
APPELLANTS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION OF THE FEDERAL APPELLEES TO AFFIRM

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QUESTION PRESENTED

Whether the district court properly granted summary judgment to the government on the constitutionality of the must-carry provisions of the Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C. 534 and 535 (Supp V. 1993), in light of the record compiled pursuant to this Court's remand instructions.

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OPINIONS BELOW

The opinion of the district court (J.S. App. 1a-112a) is not reported. The opinion of this Court remanding the case to the district court is reported at 114 S. Ct. 2445. The prior opinion of the district court is reported at 819 F. Supp. 32.

JURISDICTION

These consolidated cases were heard by a three-judge district court convened pursuant to 47 U.S.C. 555(c)(1) (Supp. V 1993) and 28 U.S.C. 2284. The judgment of the district court was entered on December 20, 1995. J.S. App. 153a-154a. The notice of appeal was filed on December 21, 1995. J.S. App. 149a-152a. The

jurisdiction of this Court is invoked under 28 U.S.C. 1253.[1]

STATEMENT

Appellants brought this action in 1992 before a three-judge district court to challenge the constitutionality of the "must-carry" provisions of the Cable Television Consumer Protection and Competition Act of 1992 (1992 Cable Act), 47 U.S.C. 534 and 535 (Supp. V 1993). Those provisions require cable operators to set aside a limited number of channels for the carriage of television signals of qualified commercial and non-commercial broadcast stations. In 1993, the district court, by a 2-1 vote, granted summary judgment for the government (as well as other defendants who had intervened to defend the constitutionality of the statute) and upheld the provisions against First Amendment challenges. 819 F. Supp. 32. On direct appeal, this Court concluded that there were genuine issues of material fact in dispute and, accordingly, vacated the grant of summary judgment and remanded the case for development of a fuller factual record. 114 S. Ct. 2445 (1994). On remand, the district court, again by a 2-1 vote, granted summary judgment and sustained the challenged provisions, in light of the legislative record

[1] Section 1253 provides for a direct appeal to this Court from any order of a three-judge district court "granting or denying * * * an interlocutory or permanent injunction." Appellants requested an injunction in their complaints, and the three-judge court's final judgment decreed that appellants "take nothing on the complaints." J.S. App. 153a. The final judgment therefore effectively denied appellants' request for an injunction, and the appeal lies to this Court under Section 1253.

and the additional factual evidence (including expert testimony) submitted by the parties.

1. a. In its prior decision, this Court rejected appellants' contention that the must-carry provisions require strict scrutiny, and ruled that they are subject only to intermediate scrutiny. The Court held that strict scrutiny does not apply because the must-carry rules are not content-based; they do not "distinguish favored speech from disfavored speech on the basis of the ideas or views expressed," and do not give a preference to "broadcasters over cable programmers based on the content of programming each group offers." *Turner Broadcasting System, Inc.* v. *FCC*, 114 S. Ct. 2445, 2459, 2467 (1994). Rather, the Court emphasized, the provisions are designed "to prevent cable operators from exploiting their economic power to the detriment of broadcasters, and thereby to ensure that all Americans, especially those unable to subscribe to cable, have access to free television programming—whatever its content." *Id.* at 2462. That purpose, the Court stated, is fully consistent with its precedents in this area, which "have held that 'protecting noncable households from loss of regular television broadcasting service due to competition from cable systems,' is not only a permissible governmental justification, but an 'important and substantial federal interest.'" *Id.* at 2461 (citations omitted).

Because the must-carry provisions are content-neutral, and because they do not pose any "inherent danger[] to free expression," the Court held that they must be sustained if they satisfy an intermediate level of First Amendment scrutiny. 114 S. Ct. at 2469. Under intermediate scrutiny, the Court reaffirmed, a content-neutral regulation will be sustained if "it

furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Ibid.* (quoting *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968)); see *Ward* v. *Rock Against Racism*, 491 U.S. 781, 799 (1989).

b. Based on the record then before the Court, the four-Justice plurality could not conclude that the government had demonstrated the absence of any genuine issue of material fact as to two parts of the constitutional test of intermediate scrutiny. The plurality therefore found it necessary to remand the case to the district court, "to permit the parties to develop a more thorough factual record, and to allow the District Court to resolve any factual disputes remaining, before passing upon the constitutional validity of the challenged provisions." 114 S. Ct. at 2472. Justice Stevens, although concluding that the government had sustained its burden under intermediate scrutiny, concurred in the remand to ensure a disposition of the case. *Id.* at 2475.[2]

Addressing the requirement that a content-neutral regulation of speech serve a substantial government interest, the Court ruled that must-carry's purpose of ensuring access by the public "to a multiplicity of information sources is a governmental purpose of the

[2] The Court accordingly rejected the view of four Justices that the must-carry rules require strict scrutiny, see 114 S. Ct. at 2475 (O'Connor, J., concurring in part and dissenting in part); *id.* at 2481 (Ginsburg, J., concurring in part and dissenting in part), and that of three Justices that must-carry is invalid under intermediate scrutiny, see *id.* at 2479-2480 (O'Connor, J., concurring in part and dissenting in part).

highest order." 114 S. Ct. at 2470. It also held that "the Government's interest in eliminating restraints on fair competition is always substantial, even when the individuals or entities subject to particular regulations are engaged in expressive activity protected by the First Amendment." *Ibid.* But while the plurality recognized the highest importance of the government's goals, it could not definitively conclude that those purposes are actually implicated by the must-carry rules. *Ibid.* The plurality stated, in particular, that the government had not yet sustained its "two essential propositions" for the validity of must-carry: "(1) that unless cable operators are compelled to carry broadcast stations, significant numbers of broadcast stations will be refused carriage on cable systems; and (2) that the broadcast stations denied carriage will either deteriorate to a substantial degree or fail altogether." *Id.* at 2471, 2472.

Regarding the separate requirement of narrow tailoring, the plurality concluded that the record needed supplementation to determine "the extent to which the must-carry provisions in fact interfere with protected speech." 114 S. Ct. at 2472. It stated that certain subsidiary questions were "critical" to the issue of narrow tailoring, including "the extent to which cable operators will, in fact, be forced to make changes in their current or anticipated programming selections; the degree to which cable programmers will be dropped from cable systems to make room for local broadcasters; and the extent to which cable operators can satisfy their must-carry obligations by devoting previously unused channel capacity to the carriage of local broadcasters." *Ibid.* The plurality also observed that the record thus far compiled failed

"to provide any judicial findings concerning the availability and efficacy of 'constitutionally acceptable less restrictive means' of achieving the Government's asserted interests." *Ibid.*

2. On remand, the district court, per District Judge Sporkin, granted summary judgment to the defendants. J.S. App. 1a-32a, 153a-154a. The court ruled that there was substantial evidence in both the legislative record and the remand evidence submitted by the parties to support reasonable inferences that the must-carry rules are necessary to protect the viability of significant numbers of broadcast stations, and that the rules do not burden substantially more speech than necessary. *Id.* at 6a-7a. District Judge Jackson, although stating his "inclination" to set the case for trial, concurred with Judge Sporkin in granting summary judgment. *Id.* at 33a. Circuit Judge Williams dissented, and argued that, although must-carry does actually further important government interests, less restrictive alternatives to accomplish those interests are available. *Id.* at 96a-109a.

a. Judge Sporkin began his analysis by emphasizing the "deferential standard of review" governing evaluation of the constitutionality of the must-carry provisions. J.S. App. 4a. He stressed this Court's admonition that the role of the courts "is not 'to reweigh the evidence *de novo*, or to replace Congress' factual predictions with [their] own'"; rather, it is "limited to assuring 'that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence.'" *Ibid.* (quoting *Turner*, 114 S. Ct. at 2471 (plurality opinion)). "Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support

a conclusion.'" J.S. App. 4a (quoting *Consolidated Edison Co.* v. *NLRB*, 305 U.S. 197, 229 (1938)). Under those dictates, Judge Sporkin stated, "[t]he Court's role is not to determine whether an inference is 'correct' or whether a given inference is more reasonable—it is not to substitute its opinion for that of Congress. As long as there is no material dispute that there is substantial evidence from which Congress could have drawn a reasonable inference, then the government is entitled to summary judgment." J.S. App. 6a.

(i) On the need for must-carry to advance the government's substantial interests, Judge Sporkin pointed to evidence of cable operators' monopoly power in the video market, including the fact that cable now reaches approximately 64% of television households and is expected to control 70% of the market by the decade's end. J.S. App. 7a & nn.6-7. He further found substantial evidence "from which Congress could reasonably conclude that cable systems had significant and increasing incentives [to use their market power] to deny carriage or reposition local broadcasting stations in order to: 1) increase their advertising revenues, the 'cable industry's hottest and brightest area of growth;' and 2) favor cable programming in which they had an equity interest." *Id.* at 9a (citation to record evidence omitted). Because of advances in technology, he observed, cable operators are increasingly able to sell advertising to an extent comparable to sales by local broadcast competitors, and there was substantial evidence "that the cable industry was increasingly looking to

advertising as a source of revenue." *Ibid.*[3] There was also substantial evidence before Congress that "cable operators with equity interests in cable programmers would have every reason to discriminate against broadcast stations competing with their own programmers." *Id.* at 10a.[4]

On the question of harm to broadcasters in the absence of must-carry, Judge Sporkin rejected appellants' argument that the must-carry rules could be sustained only if the entire broadcast industry (including the network affiliates) would fail if must-

[3] Judge Sporkin noted, *inter alia*, testimony introduced before Congress that (a) "as cable advertising spot sales grow, local cable operators will have an increased incentive to block out or severely burden local broadcast stations which represent competition for advertising revenues," and (b) "it is 'economic reality' that '[c]able operators, if allowed total control over their competitors' [broadcast] signals, can be expected to utilize it to their own advantage.'" J.S. App. 10a.

[4] As Judge Sporkin observed, the government "provided a slew of notable experts who testified to the reasonableness of Congress' conclusion that cable operators had and have substantial and increasing incentives to act adversely to local broadcast stations * * * and that the operators had acted and would act in accordance with those incentives in the absence of must-carry rules." J.S. App. 14a. Dr. Roger Noll of Stanford University reviewed studies showing that cable operators discriminate against competing programmers in favor of their own affiliated services. Defendants' Additional Evidence (DAE) Vol. II.B, Noll Dec. ¶¶ 18-20. Dr. James Dertouzos, an economist at RAND, performed a statistical analysis showing that carriage of additional broadcast signals on a cable system has a significant adverse impact on the cable operator's advertising sales volume, and that cable operators are disinclined to carry broadcast competitors because they will become stronger as a result of being afforded access to cable subscribers. DAE Vol. II.B., Dertouzos Dec. ¶¶ 24-25, 28.

carry were withdrawn. J.S. App. 8a n.11. The court instead focused on what the *Turner* plurality had identified as the government's "two essential propositions" in support of mandatory carriage rules: first, that "significant numbers of broadcast stations will be refused carriage on cable systems" absent must-carry protection, and second, "that the broadcast stations denied carriage will either deteriorate to a substantial degree or fail altogether." *Id.* at 3a (quoting *Turner*, 114 S. Ct. at 2471 (plurality opinion)).

First, Judge Sporkin concluded that Congress "had evidence that cable operators had already dropped, refused to carry, or adversely repositioned significant number[s] of local broadcasters." J.S. App. 11a.[5] "In addition to various studies," he noted, "Congress received voluminous [anecdotal] evidence of adverse carriage decisions by the cable industry directly from the harmed broadcast stations." *Id.* at 12a (citing Defendants' Joint Statement of Evidence Before Congress ¶¶ 291-467). And Judge Sporkin found reason to conclude that the evidence actually understated the harm that would have occurred to broadcasters absent must-carry, since cable operators exercised restraint during the period that Congress was considering mandatory carriage provisions. J.S. App. 12a-13a.

[5] The court noted specifically a 1988 survey conducted by the FCC, which reported that 280 of the 912 stations responding to the survey (30%) had been denied carriage in some 1,533 instances, and that 313 of the responding stations (34%) had been repositioned on cable systems, in 1,274 instances. J.S. App. 11a.

Second, Judge Sporkin found evidence that adverse carriage actions reduced broadcasters' audience levels, causing advertising revenues of commercial broadcasters to decline and also diminishing public television stations' ability to obtain viewer contributions. J.S. App. 15a. "When the revenue declines," he pointed out, "the station's ability to provide quality programming is hampered, further decreasing the viewing audience and creating a vicious cycle of declining financial stability and health." *Ibid.*[6] In addition, Congress "had evidence that the growth of the broadcast industry had been negatively impacted by the demise of the [Federal Communications Commission's (FCC's)] 1986 must-carry rules." *Id.* at 16a. It was therefore an "obvious conclusion" that financial harm to broadcasters, including their "possible ruin," would result from adverse carriage actions. *Id.* at 15a.

(ii) Addressing the requirement of narrow tailoring, Judge Sporkin examined must-carry's "actual effects" on the cable industry, as directed by this Court in *Turner*, 114 S. Ct. at 2472 (plurality

[6] A review of appellants' own data established that, even at a time when the cable industry was exercising restraint to avoid enactment of mandatory carriage regulations, the typical independent commercial broadcast station was denied access to 47% of the cable audience, and public stations were denied access to 36% of the cable audience. Gov't Mem. in Opp. to Pl. Mot. for Sum. Judg. 11-12 (June 21, 1995) (citing Rohlfs Rebuttal Dec. ¶ 3a). The government's expert Dr. Jeffrey Rohlfs (identified in Judge Sporkin's opinion, J.S. App. 17a) found further that broadcast stations dropped from cable lose nearly all of their cable audience, and that, conversely, stations that obtain cable carriage see a substantial benefit in their television audience ratings. Gov't Mem. in Supp. of Mot. for Sum. Judg. 70-71 (May 26, 1995) (citing Rohlfs Dec.).

opinion), and found those effects to be insubstantial. J.S. App. 13a n.22. He concluded that the cable industry had been required to devote only 1.2% of its channels to broadcast stations added because of the must-carry requirements. *Id.* at 19a. He also noted that, because of rapid advances in technology, channel capacity is expected to increase greatly, which increase will further diminish the already minor burden imposed on cable operators by must-carry. *Id.* at 21a-22a.[7]

Judge Sporkin also addressed several other points identified by the *Turner* plurality as "critical to the narrow tailoring step of the *O'Brien* analysis." 114 S. Ct. at 2472. Regarding "the extent to which cable operators will, in fact, be forced to make changes in their current or anticipated programming selections," *ibid.*, he found evidence that at least 69% of cable systems were not required to add any broadcast stations because of must-carry, and he noted that appellants' own expert estimated that only 640 out of 11,628 cable systems (5.5%) "have had to drop even a single programmer from their line-ups due to the addition of broadcast stations as a result of the must-carry provisions." J.S. App. 19a, 20a. As to "the degree to which cable programmers have been dropped from or repositioned by cable systems to make room for local broadcasters," 114 S. Ct. at 2472, he relied on the evidence of appellants' own expert, who "estimated that the total number of drops occasioned

[7] Tele-Communications, Inc. (TCI), the country's largest multiple system cable operator, presented evidence that, because of increased channel capacity, it was already able to restore cable programming that had been dropped as a result of the must-carry rules. J.S. App. 20a.

by the must-carry rules is 780 [out of hundreds of thousands of channels of cable capacity]." J.S. App. 20a. Finally, regarding "the extent to which cable operators can satisfy their must-carry obligations by devoting previously unused channel capacity to the carriage of local broadcasters," 114 S. Ct. at 2472, he found that cable operators have been able to do so 87% of the time. J.S. App. 19a-21a.

Finally, Judge Sporkin determined that the must-carry rules do not burden "substantially more [speech] than is necessary to achieve the government's legitimate interests," because the proposed alternatives "are not in any respect as effective" as must-carry. J.S. App. 22a-23a. He concluded, for example, that "A/B switches" permitting a television watcher to switch from cable stations to over-the-air stations are not an effective alternative to must-carry, given the cost and inconvenience involved in using A/B switches and the necessary accompanying antenna, and cable subscribers' resulting unwillingness to rely on them. *Id.* at 23a-25a.[8] He also concluded that appellants' proposed leased access regime would not work, for many broadcast stations relying on must-carry "are economically vulnerable and would not be able to pay a carriage charge or would have to reduce the expenditures on their programming in order to pay the fee." *Id.* at 26a. He reached similar conclusions about the efficacy of other proposals, such as direct subsidies to broadcasters, reliance on the antitrust laws or supervision

[8] Judge Sporkin cited one study before Congress to the effect that only 6% of cable subscribers had ever used A/B switches to receive broadcast television signals. J.S. App. 24a.

by the FCC, and more restricted carriage obligations. *Id.* at 23a-27a.[9]

b. Judge Jackson "concur[red] with District Judge Sporkin." J.S. App. 33a. Although Judge Jackson stated his preference for a trial on the evidence, he stated that he was "satisfied that, taken at face value, the evidence before Congress in 1992 of an impending demise of local broadcasting was at least 'substantial' enough to warrant its prediction * * * in the absence of must-carry." *Ibid.* Judge Jackson also accepted "as minimal the burden must-carry imposes on the cable industry's First Amendment rights of free speech." *Ibid.*

c. Judge Williams dissented. J.S. App. 38a-112a. In addressing the need for the must-carry provisions, Judge Williams interpreted this Court's mandate to require a finding that the broadcast industry *as a whole* "would be 'seriously jeopardized'" in the ab-

[9] The court ruled on three other matters. First, it dismissed appellant Time Warner's Fifth Amendment just compensation claims without prejudice, concluding that, "because [those claims] pertain to specific property interests, [they] are best dealt with on a case-by-case basis" rather than in a facial challenge to the constitutionality of the statute. J.S. App. 28a. Second, the court granted the government summary judgment on plaintiff-intervenor Atlanta Interfaith Broadcasting's challenge based on the Establishment Clause and Free Exercise Clause, stating that "this issue was properly dealt with by this Court's earlier majority opinion," which had rejected the same challenge. *Id.* at 29a. Third, the court granted summary judgment for the government on appellants' free-speech challenge to cable operators' separate obligation to carry certain low power broadcast stations, stating that, although those provisions "are very close to content-based legislation triggering strict scrutiny, we do not believe that they cross the line." *Ibid.*

sence of those rules. *Id.* at 42a-43a, 46a. Judge Williams believed it was clear that the broadcast industry as a whole (*i.e.*, including network affiliates) does not need must-carry protection to survive, and he pointed to evidence that, as a whole, the broadcast industry has experienced growth in advertising revenues, the number of broadcast stations, and overall profitability. *Id.* at 50a-61a.

Judge Williams rejected the government's argument that must-carry should be sustained if it could be shown that must-carry is necessary to bring about "a larger [broadcast] industry," or "a more prosperous one," or "a higher quality [one]," J.S. App. 62a, or that must-carry is necessary to protect those broadcast stations that would be subject to adverse carriage actions by cable operators, *i.e.*, "the stations that would elect must-carry against the will of cable operators," *id.* at 72a-73a. He believed those arguments reflected an "implausible" interpretation of this Court's mandate in *Turner*, *id.* at 73a, since, he suggested, "[i]f the Court meant that Congress had a substantial interest simply in increasing the prosperity of a significant number of TV stations[,] * * * it surely would have declared in *Turner* that Congress could reasonably infer such an effect; it would not have thought a remand necessary," *id.* at 62a.[10]

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[10] Judge Williams accepted as true that stations denied cable access lose audiences and revenues. J.S. App. 61a-63a. He found, however, that such stations account for a "diminutive share of total television viewing," although he also acknowledged that cable operators' decisions "on what to air will often not rest on [a broadcaster's or cable programmer's] meager ratings." *Id.* at 70a-71a. He also concluded that, "if there is any pattern to carriage refusal, it is concentrated in the most crowded broadcast markets," so that "those areas with the fewest broadcast stations have the greatest proportion of voluntary carriage and the least need for forced carriage." *Id.* at 71a-72a (emphasis omitted). But he did not address data indicating "that [even] in communities served by only four broadcast stations, almost half the local cable systems carried fewer than all four stations." Gov't Reply Mem. in Supp. of Mot. for Sum. Judg. 8 (June 30, 1995) (quoting Dertouzos Reply Dec. ¶ 11).

Judge Williams nonetheless did find evidence that must-carry serves important government interests. He found it "impossible to preclude the possibility of a risk of anticompetitive behavior" by cable operators, J.S. App. 73a, given their incentives to favor their own vertically integrated cable programming and to discriminate against broadcasters to impair broadcasters' ability to compete for advertising revenues, *id.* at 73a-88a. He therefore concluded that "Congress could reasonably believe cablecasters' vertical integration with programmers constituted a problem—especially if one takes into account the special congressional concern for 'promoting a diversity of views,'" *id.* at 80a-81a, and that there was at least "anecdotal evidence" of cable operators' predation against broadcasters based in competition for advertising, *id.* at 87a-88a.

Despite those conclusions, Judge Williams would have granted summary judgment for appellants, for he believed that must-carry is not a narrowly tailored remedy for the dangers he identified. J.S. App. 73a. Addressing the requirement of narrow tailoring, he first found must-carry's impact on the cable industry to be substantial. He stated that must-carry is imposed in "an environment of scarce cable channels," since cable programming choices outnumber most

cable operators' channel capacity. *Id.* at 90a-91a. He relied on data from a government survey conducted on remand showing that between 1.4% and 6% of cable systems' channel capacity was dedicated to broadcast stations added because of must-carry, and that those systems' *total* must-carry stations (including broadcast stations that elected must-carry status but would have been voluntarily carried by the cable systems anyway) accounted for between 7% and 13% of their channel capacity. *Id.* at 91a. He also noted that appellant Time Warner "added 240 broadcast stations to its systems [1.93% of its capacity] because of must-carry and had to drop programming on 75 channels [0.56% of capacity] as a result." *Id.* at 93a. To Judge Williams, this was "an obvious and direct burden on the First Amendment rights of both the programmers affected and the cable operator." *Ibid.*

Given that burden, Judge Williams found it dispositive that there were two less restrictive alternatives available to address Congress's legitimate concerns. J.S. App. 96a. He first concluded that the impediments to effective use of A/B switches by consumers are not "insuperable." *Id.* at 108a. Discounting evidence that A/B switches are ineffective as an alternative because of cost, complexity in installation, inconvenience, and signal degradation, Judge Williams determined that nothing about the A/B switch is so "costly or unworkable as to be beyond the means of a private citizen" who wishes to receive broadcast television signals that would otherwise be denied access to the cable system. *Ibid.*

Judge Williams also determined that a "nondiscriminatory" leased access regime, whereby cable operators would be required to set aside channels for both broadcasters and cable programmers at a price

fixed by the government, would be an effective, less restrictive alternative. J.S. App. 96a-103a. That scheme would in theory also benefit unaffiliated cable programmers whose ability to compete for available channels might be adversely affected by must-carry. *Id.* at 98a. Judge Williams noted that a leased access provision would avoid what he perceived to be the problem that "must-carry singles out only broadcast for forced carriage," *id.* at 97a, but he did not explain why it was necessary to extend benefits to unaffiliated cable programmers, in the absence of a congressional determination about the need to assist those programmers. Nor did he address the anomaly, noted by Judge Sporkin (*id.* at 26a), that leased access would require economically vulnerable broadcasters to pay for cable carriage, while other broadcasters that are not threatened with anti-competitive harm, such as the network affiliates, would continue to obtain free cable carriage.

ARGUMENT

Appellants' request for further review is based upon the erroneous premise that the must-carry rules can be sustained only if they are necessary to protect the economic viability of the broadcast industry as a whole. See J.S. 11-12. This Court did not indicate in *Turner*, however, that only the preservation of the *entire* broadcast industry could be considered a substantial governmental interest. To the contrary, the Court stated that "assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order," 114 S. Ct. at 2470, and its remand instructions focused upon a potential threat to "significant numbers of broadcast stations" that might be refused

carriage on cable systems, *id.* at 2471 (plurality opinion). Once the issue for the district court's decision is framed correctly, it becomes clear that the district court faithfully followed this Court's directions and reached the correct conclusion, based on an adequate factual record. Plenary review by this Court of the factual record developed on remand is, therefore, unnecessary.

1. Appellants' jurisdictional statement does not acknowledge fully the carefully prescribed framework for further inquiry articulated in this Court's remand instructions. The *Turner* decision took care to reaffirm the respect that the Judicial Branch must accord to the fact-finding role of Congress that underpins all legislation, and especially legislation involving predictive judgments about the future operation of economic forces. "Sound policymaking often requires legislators to forecast future events and to anticipate the likely impact of these events based on deductions and inferences for which complete empirical support may be unavailable." 114 S. Ct. at 2471 (plurality opinion). This Court's remand instructions accordingly called for a limited inquiry, "to assure that * * * Congress has drawn reasonable inferences based on substantial evidence." *Ibid.* The district court was directed not to "reweigh the evidence *de novo*, or to replace Congress' factual predictions" with its own. *Ibid.*

2. a. The first component of the inquiry required by the remand instructions concerns appellants' challenge to the seriousness of the problem to which the must-carry rules are addressed. See *Turner*, 114 S. Ct. at 2470 (plurality opinion). The plurality explained that it was concerned about two of the government's propositions, namely:

> (1) that unless cable operators are compelled to carry broadcast stations, *significant numbers* of broadcast stations will be refused carriage on cable systems; and (2) that the broadcast stations denied carriage will either deteriorate to a substantial degree or fail altogether.

Id. at 2471 (emphasis added).

Thus, contrary to the major premise of appellants' request for plenary review (see J.S. 13-15), Congress was not required to—and in fact did not—predicate the must-carry rules on an immediate need to preserve the broadcast industry "as a whole." Indeed, the retransmission consent provisions in Section 6 of the 1992 Cable Act, 47 U.S.C. 325 (1988 & Supp. V 1993) (see J.S. App. 140a-143a), are premised on the assumption that the cable operators would not only carry many broadcast stations voluntarily, but would even pay for the privilege in the case of the most popular broadcast stations. Under those provisions, no cable operator may retransmit a commercial television station's broadcast signal unless that station elects to exercise its "must-carry" right *or* it authorizes carriage by the cable operator, for which it may demand compensation under FCC regulations. See 47 U.S.C. 325(b)(1) and (3) (Supp. V 1993).

b. The record compiled by Congress and further developed in the district court provides ample evidence that "significant numbers of broadcast stations" would be dropped from cable carriage in the absence of the must-carry rules. J.S. App. 9a-14a; see also Defendants' Joint Statement in Response to Court's Order of July 17, 1995, ¶¶ 36-47 (Aug. 8, 1995)